

UNITED STATES OF AMERICA
BEFORE THE MERIT SYSTEMS PROTECTION BOARD

In the matter of:

RONALD G. HEIN

v.

OFFICE OF PERSONNEL MANAGEMENT

} Docket No.

} HQ831-80-20

OPINION AND ORDER

Appellant Hein filed an appeal with the Washington, D.C., Field Office of the Board on July 2, 1979, from the June 14, 1979 decision of the Office of Personnel Management (OPM) which denied his claim for credit for retirement purposes, under 5 U.S.C. 8336(c). In connection with his appeal, appellant, presently an employee of the U.S. Marshals Service, requested a hearing. The presiding official scheduled a hearing for December 20, 1979.

In response to the appeal, OPM submitted an undated brief in which it responded to the merits of appellant's claim and set forth its position that appellant was not entitled to a hearing before the Board. Upon notification that a hearing was to be granted, OPM filed a Motion for Certification of Interlocutory Appeal, dated December 5, 1979. Both the brief and the Motion contain two primary arguments. First, it is contended that the instant appeal was filed prior to the effective date of the Civil Service Reform Act of 1978, P.L. 95-454, 92 Stat. 1111 (October 13, 1978), so that the procedures applicable to retirement-related cases prior to the January 11, 1979 effective date should apply to this appeal. Second, OPM argues that, assuming arguendo that the provisions of the Reform Act apply, they still do not entitle the appellant to a hearing in this case.

More specifically, the agency contends, with respect to the first matter, that appellant initially petitioned the Civil Service Commission concerning credit for his retirement claim on May 15, 1978, and that under section 902(b) of the Reform Act, any administrative proceeding pending on the effective date of the Reform Act was to be completed as if that Act had not been enacted. Because the procedures previously applicable to appeals such as the instant one did not provide for hearings, it is OPM's position that no hearing is warranted in this case either.

As to its second argument, OPM states that 5 U.S.C. 7701 does not apply to civil service retirement matters because 5 U.S.C. 8347(d) provides an independent basis for the Board's jurisdiction

over retirement appeals. It is OPM's contention that the retention by Congress of section 8347(d) in the same legislation which enacted the current section 7701, indicates that that body did not intend for the elaborate appellate procedures of section 7701 to apply to retirement cases. Otherwise, OPM argues, it must be presumed that Congress enacted a superfluous provision when it retained 5 U.S.C. 8347(d). Further, because section 7701 only applies to "an employee or applicant for employment," while many of the persons who appeal retirement-related matters are annuitants, spouses, children, and other relatives of former Federal employees, OPM believes that the language of the law, itself, supports a conclusion that Congress did not intend that 5 U.S.C. 7701 apply to retirement appeals. As further support for its position, OPM refers to the terms of 5 U.S.C. 7703(a), which limit the class of persons entitled to seek judicial review of a decision of the Board to employees and applicants. It states that waivers of sovereign immunity from suit must be explicit and strictly construed, and that because of the language of section 7703(a) it would be necessary to conclude that Congress intended to exclude all appellants in retirement-related cases, except employees and applicants for employment, from the right to sue.

Finally, OPM contends that the decision to grant a hearing in all cases arising under 5 U.S.C. 8331 et seq. would have a substantial adverse impact on its ability to administer the retirement system efficiently and effectively because of the strain this would place on its resources.

By letter of December 11, 1979, the appellant responded to OPM's motion by denying that his is an "old case" and stating his belief that 5 U.S.C. 7701 does apply to retirement matters.

In accordance with 5 C.F.R. 1201.93(b), the presiding official granted the motion for certification and referred the record to the Board on December 12, 1979. Under 5 C.F.R. 1201.93(c), she granted a stay of the scheduled hearing while the interlocutory appeal is pending.

We consider first OPM's argument that the provisions applicable to retirement appeals prior to the enactment of the Civil Service Reform Act are applicable to this case.

Section 902(b) of the Act provides:

No provision of this Act shall affect any administrative proceedings pending at the time such provision takes effect. Orders shall be issued in such proceedings and appeals shall be taken therefrom as if this Act had not been enacted.

At C.F.R. 1201.191(b), the Board construed this provision of the Act as follows:

No provision of the Civil Service Reform Act shall be applied by the Board in such a way as to affect any administrative proceedings pending at the effective date of such provision. "Pending" is considered to encompass existing agency proceedings, and appeals before the Board or its predecessor agencies, that were subject to judicial review or under judicial review on January 11, 1979, the date on which the Act became effective. An agency proceeding is considered to exist once the employee has received notice of the proposed action.

Significantly, on October 26, 1979, the District of Columbia Circuit of the U.S. Court of Appeals issued an opinion in three consolidated cases (*Kyle v. ICC*, No. 79-1307; *Oswald v. ICC*, No. 79-1345; *Stone v. HEW* No. 79-1505 (D.C. Cir., October 26, 1979)), granting the Government's motions to dismiss appellants' petitions to review final Board decisions that were issued after January 11, 1979, based on appeals by employees who had received notice of the proposed actions prior to January 11, 1979. In its opinion, insofar as it is relevant here, the court approved the Board's interpretation of the savings provision, noting that it "should be respected, in accordance with the judicial deference usually accorded to the interpretation made by the agency charged with a statute's administration (citations omitted)" (*Id.* slip op. at 4).

In the instant case, appellant contends that he submitted a letter to the Civil Service Commission, which previously acted on civil service retirement claims, on March 15, 1978. The Office of Personnel Management, in reliance on this letter, contends that the case should be considered an "old system" case. The record shows, however, that appellant did not receive a response to his March 1978 letter, and that it was not acknowledged as having been received. That letter is a part of the record of the case only because appellant submitted a copy in May 1979. The file contains no evidence that the original was received or acted upon, or that any action was taken by OPM until it received the May 18, 1979 letter which appellant submitted on the same matter. In fact, in reference to the March 15, 1978 letter, OPM stated in its response to the appeal to the Field Office that:

It is uncertain whether this initial correspondence was ever received by the Civil Service Commission. If so, it was apparently inadvertently misplaced and no response made to appellant.

Under these circumstances, the Board finds that the instant appeal cannot be considered to have been "pending" on January 11, 1979. By the regulatory definition of that term, cited above, this appeal was not pending on that date because there were no "existing agency proceedings" at the time. While it may be appropriate to find, in cases involving retirement service credit applications,

where the administrative proceeding is initiated by an individual rather than the agency, that administrative proceedings are pending once the application for benefits has been received, the record contains no evidence that appellant's 1978 application was ever received or considered. Under these circumstances, the Board finds that section 902(b) of the Civil Service Reform Act does not exclude the instant appeal from the coverage of that Act.

Having so found, we now consider whether appellant is entitled to the hearing on his appeal, which he requested on July 2, 1979.

As noted above, it is OPM's contention that Congress intended that 5 U.S.C. 7701 not apply to retirement-related appeals, and that 5 U.S.C. 8347(d) be considered applicable in lieu of the former section. Section 8347(d) provides:

An administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

Section 7701 provides, in part, as follows:

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

- (1) to a hearing for which a transcript will be kept; and
- (2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases

Because section 8347(d) granted to the Board the right to prescribe regulations for the processing of retirement-related appeals, OPM contends that this indicates a Congressional intention not to provide the full section 7701 panoply of rights to appellants in such cases. It is OPM's position that the Board must draft an appellate procedure for the processing of appeals concerning subchapter III, chapter 83, of Title 5, U.S. Code, in order to implement the provisions of section 8347(d).

Because appellant Hein is an employee of the Federal Government, this case could be decided on the basis of 5 U.S.C. 7701(a) alone, which expressly provides a right of appeal to "[a]n employee," and sets forth the employee's right to a hearing at which a transcript will be kept and to representation during the course of the appeal. Since the appellant is an employee, this provision of the law clearly entitles him to a hearing.

We need not rest the appellant's right to a hearing solely on this ground, however. Subsection (b) of section 7701 provides that "The Board may hear any case appealed to it" This provision does not limit the Board's authority to hear cases to those which are submitted by employees and applicants for employment. Similarly, section 1205(a)(1) provides that the Board is to "hear, adjudicate, or provide for the hearing or adjudication of all matters within the jurisdiction of the Board under this title" Accordingly, both section 7701 and section 1205 provide authority from the Board to "hear" any case which comes before it. As noted above, both section 7701 and 8347 authorize the Board to regulate the procedures by which appeals will be heard or adjudicated, and the latter provision is not limited to appeals by employees and applicants. We conclude, therefore, that sections 7701 and 8347 are not inconsistent in this regard, and that the Board has ample statutory authority to extend hearing rights to appellants other than employees and applicants for employment.

In accordance with these statutory authorities, the Board has promulgated regulations governing the processing of appeals. At 5 C.F.R. 1201.3, the Board's appellate jurisdiction is defined. Subsection (a)(6) expressly includes "Determinations relating to disability retirement, health insurance, and annuities." Section 1201.11 of the regulations states that "The rules in this subpart apply to appellate proceedings of the Board." Therefore, contrary to OPM's implication that the Board has failed to provide appellate procedures for the adjudication of appeals concerning retirement matters, the procedures set forth in subpart B of part 1201 of Title 5, Code of Federal Regulations, constitute those procedures. Section 1201.24(c) thereof states that "Under 5 U.S.C. 7701, an appellant has a right to a hearing. Alternatively, the appellant may choose to have the determination based on the record." (Emphasis added.) This regulation makes it clear that it is "an appellant," rather than just an employee or an applicant for employment, who may request a hearing, and that it is the choice of that party, rather than the agency involved, whether the case should be adjudicated on the documentary record or only after a hearing. (Section 1201.25(b) of the regulations provides the Board's presiding official with discretion to grant or deny a hearing when one is requested by the agency.)

In summary, it is clear that the Board has statutory authority to extend the right to a hearing to all applicants whose appeals are subject to adjudication by the Board, and that this discretion has been exercised through section 1201.3 of the Board's regulations. Accordingly, we conclude that because of his status as an employee and because of the regulatory extension of the right to a hearing to all appellants, the appellant in the instant case is entitled to a

hearing before the presiding official assigned to adjudicate his appeal.

Finally, we find no basis for denying the right to a hearing on the ground that such hearings will create an additional burden on OPM or that hearings are unnecessary where the interpretation of law rather than facts is involved. The legislative history of the Civil Service Reform Act shows that Congress considered, but rejected, a provision which would have granted hearing rights only in cases involving a material issue of fact. See Conference Report on S. 2640, S. Rep. No. 95-1717, 95th Cong., 2d Sess. 137 (1978). Neither the burden on the agency nor the alleged lack of issues of fact, therefore, is an adequate basis for denying a right to a hearing for all appellants.

Accordingly, it is ORDERED that:

1. The motion of the Office of Personnel Management to deny a hearing in the instant case is hereby DISMISSED; and
2. This case is REMANDED to the presiding official for further processing and adjudication in accordance with 5 C.F.R. part 1201, subpart B.

For the Board:

RUTH T. PROKOP.

January 29, 1980.